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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,213
(C.A. No. 916-64)

DAVID R. WEINBERG, Appellant,

v.

JOHN W. MACY, Jr., Commissioner
of Civil Service Commission, et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
GIL ZIMMERMAN,
ALLAN M. PALMER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellant answered in the negative question 33 on his Application for Federal Employment, Standard Form 57 which stated:

> "33. Have you ever been arrested, charged, or held by any Federal, State, or other law-enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance? Do not include anything that happened before your 16th birthday. Do not include traffic violations for which a fine of $25 or less was imposed. All other charges must be included even if they were dismissed."

Less than 5 months before appellant - a college graduate - answered this question "no" he had been arrested on a warrant charging him with failure to provide for the support of his illegitimate child, brought into open court, pleaded guilty to the charge, sentenced to 12 months hard labor, suspended on condition that he provide partial support for the child and execute a probation bond in the amount of $300.

1) Was there a rational basis in the record to sustain appellant's discharge from the civil service for answering question 33 falsely?

2) Was it vitiating error for the employing agency not to disclose to appellant the name of the individual who brought his malefaction to light, when the agency determination to discharge appellant was based solely on the court records evidencing his conviction, appellant knew all of the principals to that court proceeding and was free to have them testify or prepare affidavits in his behalf, the information sought had no bearing upon his defense and when appellant admitted that he was the individual who had in fact been arrested and convicted?

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,213
(C.A. No. 916-64)

DAVID R. WEINBERG, Appellant,

v.

JOHN W. MACY, Jr., Commissioner
of Civil Service Commission, et al., Appellees.

MOTION TO AFFIRM OR DISMISS, OR IN THE ALTERNATIVE THAT THE INSTANT MOTION BE CONSIDERED AS APPELLEES' BRIEF

Appellees' by their attorney, the United States Attorney, respectfully move that the instant appeal be dismissed as frivolous or that the order of the District Court be summarily affirmed. In the alternative, appellees' move that the instant motion be considered as their brief.

This appeal, in forma pauperis, was granted by a divided panel of this Court on February 12, 1965. Appellant presents for review a Government employee discharge case. The appeal is from a final order, dated November 25, 1964, denying plaintiff's motion for summary judgment, granting defendants' motion for summary judgment and dismissing the cause of action.[1/]

Appellant, a veteran's preference eligible (5 U.S.C. § 851) was employed as an Internal Revenue Agent, GS-9, in the Audit Division, Field Audit Branch. Internal Revenue Service (hereinafter I.R.S.), U.S. Treasury Department, Birmingham,

1/ Appellant has proceeded pro se in the District Court and in this Court

Alabama. By letter dated January 2, 1963, appellant was notified by Mr. George D. Patterson, District Director, I.R.S., Birmingham, Alabama, that in order to promote the efficiency of the I.R.S., it was proposed that appellant be removed from his employment in not less than 30 calendar days from the receipt of the notice. The reason for his removal was stated to be the following:

> "In your Application for Federal Employment, Standard Form 57, dated June 27, 1960, you answered Question 33, 'Have you ever been arrested, charged, or held by Federal, State, or other law-enforcement authorities for any violation of any Federal law, State law, county or municipal law, regulation or ordinance?' in the negative. Investigation has disclosed that you were charged and convicted in Jefferson County Juvenile Court, Birmingham, Alabama, on a bastardy action to which you pleaded guilty on February 2, 1960. You were sentenced to '12 months hard labor for Jefferson County,' which sentence was suspended on the following conditions: (1) Report to Court at any time ordered within next two years; (2) Pay to Clerk and Register of Court $10.00 per week for partial support of SHEILA ANN PERKINS, beginning February 6, 1960; and (3) Pay costs of $14.80."

He was also advised of his right to reply personally and in writing to this charge.

By letter and affidavit dated January 11, 1963, appellant alleged that all of the proceedings concerning the case had been handled by his attorney and, "[a]t no time during the entire proceedings was I ever notified by anyone that I

had been arrested or that any criminal charge had been made against me." (Affidavit pg. 2.)

> ". . . I understood the charges by Miss Perkins against me to be civil in nature." (Affidavit pg. 3.)

He also stated that:

> " 9) The proposed action to remove me from service is not made in good faith and is made solely because of personal differences between me and my immediate superior." (letter pg. 2.)

Appellant also requested an oral hearing which was held on January 16, 1963. At that hearing he was represented by counsel. A summary of that hearing reveals that appellant did not submit additional evidence to the District Director but determined to rely upon his written reply.

> "And again the District Director explained that the sole charge involved in this matter was the falsification of the Form 57; thereby depriving the Agency of the right to determine whether or not the applicant was, in fact, well qualified to be a Revenue Agent." (summary of hearing.)

The same charge and specification contained in the letter of January 2, 1963 was repeated in a superseding notice dated February 4, 1963. By letter dated February 11, 1963, appellant acknowledged receipt of this notice and, since the charge was the same, decided to stand upon the existing record.

The District Director, in a letter dated February 20, 1963, informed appellant that he would be removed from the

I.R.S. on March 8, 1963.

Mr. Patterson stated:

> "I have given full consideration to the information contained in your letters of January 11, 1963, with attachment thereto and February 11, 1963, as well as in your oral presentation of January 16, 1963. I find, however, that the charge listed in my letter of February 4, 1963, is fully supported by the evidence and warrants your removal to promote the efficiency of the Service."

Question 33 on Standard Employment Form 57, which appellant answered No on June 27, 1960 read:

> "33. Have you ever been arrested, charged, or held by any Federal, State, or other law-enforcement authorities for any violation of any Federal law, state law, county or municipal law, regulation or ordinance? Do not include anything that happened before your 16th birthday. Do not include traffic violations for which a fine of $25 or less was imposed. All other charges must be included even if they were dismissed."

At the time this form was filled out appellant had recently been graduated from the University of Alabama. Less than 5 months before appellant answered question 33 in the negative, he was arrested in Alabama on a warrant charging him with failure to provide for the support of his illegitimate child, "Against the peace and dignity of the State of Alabama." The warrant was entitled:

> "THE STATE OF ALABAMA
>
> vs.
>
> David Robert Weinberg."

In bold print upon the face appears:

"WARRANT OF ARREST."

The warrant bears the notation that it was executed with the arrest of appellant on February 2, 1960 and that he was then brought into open court. Right beneath this appears the notation signed by appellant:

"Def. waives 5 days
legal notice.

David Robert Weinberg"

On the same date, February 2, 1960, appellant signed a $300 probation bond entitled:

"STATE OF ALABAMA

vs.

David Robert Weinberg
Defendant"

It read in part:

> "The condition of the above obligation is such, that whereas the Judge . . . in the above styled case, before the trial with the consent of the defendant, or at the trial, on entry of a plea of guilty, or after conviction, instead of imposing the penalties provided by law, did suspend the sentence imposed against the said defendant, upon the following terms and conditions: (1) That the defendant make his personal appearance in this Court at any time within two years from this date, when ordered to do so by this Court; (2) Pay to Clerk & Register of this Court $10.00 each week for partial support of Shelia Ann Perkins, whose paternity defendant admits in open court, beginning February 6, 1960; (3) Costs taxed in the amount of $14.80 to be paid today."

The bond further states that the Court "did order the said defendant released on probation upon his entering into a recognizance as conditioned herein;" A court order was entered the same day summarizing the proceedings as follows:

> "Case No. 19403: Plea of guilty. Defendant found guilty. Sentenced to 12 months hard labor for Jefferson County. Sentence suspended on the following conditions: (1) Report to this Court at any time ordered to do so within the next two years; (2) Pay to Clerk and Register of this Court $10.00 each week for partial support of Sheila Ann Perkins, whose paternity defendant admits in open court, beginning February 6, 1960; (3) Costs taxed in the amount of $14.80 to be paid today. Probation bond fixed at $300.00 without further surety."

On March 11, 1963 appellant appealed the agency's decision to remove him to the Civil Service Commission's (hereinafter C.S.C.) Regional Director, Atlanta, Georgia. In connection with that appeal, appellant waived his right to a hearing before a representative of the C.S.C. His affidavit of waiver dated March 25, 1963 recited:

> "I have been advised by the Commission's Representative of all evidence obtained in the Commission's investigation of my appeal. I do not have additional evidence to present.
>
> I have been advised as to my rights to a hearing. I understand that the employing agency will be invited to participate in the hearing and that both parties may present evidence and witnesses, and cross-examine and make representations at the hearing."

In his letter noting the appeal to the C.S.C. he reiterated:

> ". . . I never knew until the current proceedings that I was technically arrested and convicted of said charges . . . . I firmly believe that I am being removed from my position for reasons that go beyond my unintentional incorrect answer. I submit that due to personal differences between my superior and myself that he was/is looking for a way to 'get rid' of me."

Procedurally he complained that the February 20, 1963 letter of discharge was not adequate in that it did not disclose "how they arrived at the conclusion in their 'consideration' that I 'intentionally' falsified my application." (Citing I.R.S. rules.) He further complained that he had not been allowed to obtain information he had requested from the District Director on January 9, 1963, concerning his case. All his questions at that time related to how his prior arrest and conviction had come to light. He was advised by memorandum the same date that such information pertains "to the investigation and Inspection Service which we are not allowed to disclose."

In a rebuttal affidavit to the C.S.C., dated March 18, 1963, and sworn to March 22, 1963, the District Director, Mr. Patterson, stated that:

> "It is my decision that his removal did promote the efficiency of the Service inasmuch as if he had not falsified his application and had showed that he had been charged and convicted of a non-support or desertion charge in Juvenile Court that it would have adversely affected his being selected for the position of Revenue Agent . . . . In Mr. Weinberg's appeal he stated

> that he believes he was removed from his position for reasons other than falsification of his application. This is not a correct belief or assumption. There is no documentation to support these allegations. I have checked with all my Audit Division supervisory personnel, and they assured me that this is a false assumption. Mr. Weinberg was separated for falsification of application as outlined in my letter to him dated February 20, 1963. Mr. Weinberg stated he was not allowed to see the document that brought his falsification of application to the attention of the Revenue Service. All information necessary to prove that he did falsify his application is on record at the Juvenile Court, Jefferson County, Alabama. Mr. Weinberg is certainly aware of this as this was where he was charged and convicted."

Under cover letter of April 23, 1963, the C.S.C. denied appellant's appeal. The Commission carefully examined the procedural aspects of the case and found them to have conformed to the applicable statutes and regulations. With regard to appellant's claim that reasons other than his false answer to question 33 of the Form 57 motivated his discharge, the Commission found:

> "On the basis of the evidence submitted, we find that the claim of 'other reasons' is not sustained."

As to the charge for which appellant was removed, the Commission found:

> "The appellant substantially admitted the facts as stated in the charge. However, he claimed that he answered 'no' to the question because he believed that to be an honest answer; that he didn't know until the current proceedings that he had been technically arrested and convicted of the stated charges;

that as far as he was concerned, it was a very unpleasant matter that he left completely in the hands of his attorney.

We have carefully considered the appellant's claim. However, we do not find that it is supported by the evidence:

The warrant for his arrest, dated February 2, 1960 (Exhibit 2), and signed by him, shows that he was arrested and brought into open court on February 2, 1960.

The court order (Exhibit 4) shows that on a plea of guilty he was sentenced to 12 months of hard labor, but that such sentence was suspended on the basis of conditions as were stated in the agency's advance notice. The probation bond was fixed at $300.00.

The probation bond (Exhibit 3) was signed by the appellant and states the conditions on which the sentence was suspended.

> Based on the appellant's admissions and the evidence submitted, we find that the charge is sustained."

By letter dated April 29, 1963, appellant appealed to the C.S.C. Board of Appeals and Review, Washington, D. C. Appellant again asserted his lack of knowledge of exactly what occurred in the Bastardy Action; i.e., that he was arrested and convicted in the Alabama State Court. He also stated that he did not believe his discharge would promote the efficiency of the service.

In a rebuttal letter to the Board, dated May 27, 1963, the District Director stated:

> "I feel that the removal of Mr. Weinberg did promote the efficiency of the Service in that it is in compliance with our standards of conduct which are very rigid due to the daily dealings with the outside public

> particularly in positions such as Internal Revenue Agent which Mr. Weinberg formerly occupied."

After a careful consideration of the entire record in the case, the Board of Appeals and Review affirmed the decision of the Atlanta Regional Office. The Board could not accept appellant's contention that he did not know that he had previously been arrested or convicted in face of the evidence to the contrary.

> ". . . the Board of Appeals and Review agrees with the Atlanta Regional Office that the procedural requirements were met by the agency in effecting your removal; that the charge is supported by the credible evidence; and that your removal, based upon the sustained charge, was for such cause as will promote the efficiency of the service within the meaning of that language in the Veterans' Preference Act and the Commission's regulations."

Appellant then instituted the instant cause in the District Court alleging arbitrary and capricious administrative action. In an amended complaint he alleged, for the first time, that his Fourth, Fifth, and Sixth Amendment rights had been violated.

Applicable Law

In Government employee discharge cases review in this Court is limited to determining whether the statutory and regulatory procedures were observed and whether the challenged action was arbitrary and capricious or had a rational basis in the record. Pelicone v. Hodges, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963). Compare McTiernan v. Gronouski, 337 F.2d 31 (2d

Cir. 1964). In the case at bar the procedures were observed. See 5 U.S.C. § 863; 5 C.F.R. § 22.202 et seq. (1963 cum. supp.); I.R.S. Regs. § 1982.6 et seq. Although appellant complained to the C.S.C. Regional Director that the letter of discharge was not adequate because the mental processes leading to the decision were not disclosed therein, such complaint was plainly frivolous. Green v. Baughman, 100 U.S. App. D.C. 187, 189, 243 F.2d 610, 612, cert. denied, 355 U.S. 819 (1957). His further desire to know how his malefaction came to light and agency refusal to disclose the source of its information, are factors of no legal significance. The agency determination to discharge appellant was based solely upon the documents contained in the Alabama Court records. How the agency learned of the Bastardy Action against appellant had no bearing upon appellant's defense to the charge that he falsely answered question 33 on his Form 57. He knew all the principals to that court proceeding and was free to have them testify or prepare affidavits in his behalf. See Roviaro v. United States, 353 U.S. 53 (1957).

Appellant's attempt to inject new so-called constitutional issues into the case, beyond the administrative record, must fail. Unemployment Comm'n v. Aragon, 329 U.S. 143, 155 (1946).

Further, the C.S.C.'s findings are supported by the record and were not arbitrarily or capriciously arrived at. There is accordingly no basis upon which to overturn the agency determination herein. Dew v. Halaby, 115 U.S. App. D.C. 171,

317 F.2d 582 (1963), cert. dism'd, 379 U.S. 951 (1964). See 5 C.F.R. § 2.106(4) (Rev. 1961); 5 C.F.R. § 22.104 (1963 cum. supp.). See also Barger v. Mumford, 105 U.S. App. D.C. 188, 265 F.2d 380 (1959). Even the most credulous would find it hard to believe that this college educated appellant did not know he was arrested or convicted of an offense when less than 5 months before filling out his Form 57 he had been arrested on a warrant, signed the warrant of arrest, pleaded guilty to the Bastardy charge, was sentenced to 12 months at hard labor (suspended), and signed a probation bond as a condition to his enlargement. Ample support for the discharge is thus to be found in this record.

In sum, this appellant received as much due process and consideration in being discharged as perhaps any employee who lied to his boss and was fired for so doing.

Wherefore, it is respectfully submitted that the appeal be summarily affirmed or dismissed as frivolous, or in the alternative, that the instant motion be considered as appellee's brief.

/s/ DAVID C. ACHESON
DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ GIL ZIMMERMAN
GIL ZIMMERMAN
Assistant United States Attorney

/s/ ALLAN M. PALMER
ALLAN M. PALMER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to appellant, David R. Weinberg, 4721 Terrace South, Central Park, Birmingham 8, Alabama, this 28th day of June, 1965.

/s/ ALLAN M. PALMER
ALLAN M. PALMER
Assistant United States Attorney

APPELLEES' RESPONSE TO APPELLANT'S OPPOSITION TO APPELLEES' MOTION FOR CLARIFICATION OR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19213

DAVID R. WEINBERG,

Appellant,

v.

JOHN W. MACY, JR., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

JOHN W. DOUGLAS,
Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

ALAN S. ROSENTHAL,
RICHARD S. SALZMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19213

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APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' RESPONSE TO APPELLANT'S OPPOSITION TO APPELLEES' MOTION FOR CLARIFICATION OR REHEARING

I

The Court's decision remands this cause for further proceedings at which the government is directed to present "full evidence" as to exactly what transpired in certain Alabama court proceedings involving Mr. Weinberg. Appellant now urges that "it is for the District Court, not the Civil Service Commission, to hear the evidence and administer the test" (Opposition, p. 8). Appellant offers no authority in support of that contention, as indeed he cannot, for this Court has rejected it. In Dabney v. Freeman, No. 19207, C.A.D.C., decided December 28, 1965,

this Court reiterated (slip opinion, pp. 4-5):

> There can, we think, be little doubt that Congress intended personnel grievances of this kind to be heard and determined in the first instance by the Commission and not by the District Court. The latter has enough to do without displacing the Civil Service Commission in this area, at least without a clearer mandate from Congress than it now has.

Dabney also makes clear that on remand as well as on original hearing, initial receipt and evaluation of evidence in employee discharge cases is for the Civil Service Commission. In that case a former Agriculture Department employee sought a judgment from the district court compelling her reinstatement to a government position on the ground that her "resignation" had been coerced. The Civil Service Commission had previously declined to entertain her complaint because, in its view, it lacked jurisdiction over "resignations" as distinguished from discharges. The district court declined to pass on the voluntariness of the resignation but remanded the cause to the Commission. After taking evidence the Commission found the resignation to have been uncoerced. The district court affirmed the action of the Civil Service Commission. Although the remand order in Dabney was with the consent of the parties, in its review of that case this Court stated (slip opinion, p. 5):

> A proper observance of the Congressional allocation of functions and related resources may not be safely left to a coincidence of desire by the parties to have their controversy tried in

> one forum rather than another. Here, in our view, the consent order seems to us to have been wholly consonant with, if indeed not dictated by, a due respect for that allocation; and we think the District Court acted wisely in entering it. (Emphasis added.)

Contrary to appellant's position, then, Dabney is directly in point. Here, as in Dabney, there has been a judicial determination that there are unresolved factual issues which necessitate the receipt of additional evidence. Here, as in Dabney, "a due respect" for the "Congressional allocation of functions" calls for the receipt of that evidence by the Commission. And see, Sudduth v. Macy, 119 U.S. App. D.C. 280, 281, 341 F.2d 413, 414; Goodman v. United States, No. 19,654, C.A.D.C., decided March 10, 1966.

II

Appellant's alternate contention, that the Court should dispose of this cause by directing the court below to enter summary judgment in his behalf, is singularly without merit in view of the admissions appellant now makes in his Opposition. In setting aside the judgment of the district court upholding appellant's discharge from the Internal Revenue Service for falsifying his employment application, this Court based its action in large measure on the government's asserted "inaccuracy" in characterizing the series of Alabama court proceedings in which Mr. Weinberg had been involved--and which he did not reveal on his employment application--generally as "bastardy proceedings." The Court acknowledged, however, that (slip opinion, pp. 5-6):

> [Weinberg's] claim that he did not know what was happening is highly implausible if bastardy were the action to which he was subjected.

We respectfully draw the Court's attention to the fact that Mr. Weinberg-through counsel--now concedes that the government's characterization of those proceedings was substantially correct. At page 10 of his Opposition to our Motion for Clarification or Rehearing he states:

> The opinion of the court pointed out errors in the government's presentation and its confusion about Alabama bastardy and desertion and non-support proceedings. In fact, the mother of appellant's illegitimate child instituted both bastardy and non-support proceedings against him, * * * . (Emphasis added.)

And at page 12 of that Opposition, appellant further admits that:

> On March 5, 1959, an action was brought against him in a bastardy proceeding. It remained dormant until February 2, 1960, when after the birth of the child, the appellant acknowledged paternity in open court in the bastardy proceeding. (Emphasis added.)

Moreover, even if Alabama bastardy proceedings were "quasi-criminal," there can be no question that the non-support proceedings against Weinberg under Title 34, §§ 89-104 of the Alabama Code (1958 ed.) were plainly criminal in nature[1/] and therefore should have been reported on his employment questionnaire. The Internal Revenue Service did not discharge appellant because he was the father of an illegitimate child. Rather, he was dismissed because he failed to acknowledge on his pre-employment questionnaire the existence of the serious Alabama proceedings in which he had been involved. Surely the Revenue Service was entitled to be apprised of such matters--which might well make appellant vulnerable to blackmail --before it appointed him to the sensitive position of Revenue Agent. And upon later discovery of that concealment, it was not arbitrary for the Revenue Service to discharge appellant where it believed--with reason--that he intentionally withheld that information. While we remain of the view that the original record amply supported the grounds for discharge, at the very least the government is entitled to present on remand of this cause additional supporting evidence to that effect.

1/ In Section 90, desertion and non-support is expressly denominated a misdemeanor punishable by fine and imprisonment up to one year. In addition, under § 98, the convicted party may also be ordered to support his illegitimate child. See, St. John v. State, 22 Ala. App. 115, 118, 113 So. 321, 324.

CONCLUSION

For the reasons stated above and in our original Motion, it is respectfully requested that this Court clarify its December 22, 1965 opinion as suggested in that Motion, or, in the alternative, grant a rehearing or a rehearing en banc.

Respectfully submitted,

JOHN W. DOUGLAS,
Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

ALAN S. ROSENTHAL,
RICHARD S. SALZMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

MAY, 1966.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID R. WEINBERG, Appellant, v. JOHN W. MACY, JR., et al., Appellees.	)	No. 19,213

OPPOSITION TO APPELLEES' MOTION FOR CLARIFICATION
AND ANSWER TO APPELLEES' PETITION FOR REHEARING
OR REHEARING en banc

Louis F. Oberdorfer
James Robertson
Attorneys for Appellant
Appointed by this Court

Of Counsel:

WILMER, CUTLER & PICKERING

I N D E X

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID R. WEINBERG, Appellant, v. JOHN W. MACY, JR., et al., Appellees.	)	No. 19,213

OPPOSITION TO APPELLEES' MOTION FOR CLARIFICATION AND ANSWER TO APPELLEES' PETITION FOR REHEARING OR REHEARING en banc

Appellant, by his court-appointed counsel, opposes appellees' Motion for Clarification and Petition for Rehearing or Rehearing en banc. Appellant respectfully submits, however, that if this Court does reconsider its prior decision, it should dispose of this case by modifying its remand order to instruct the District Court to enter summary judgment for appellant. Pelicone v. Hodges, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963).

I.

BACKGROUND OF THE CASE

Appellant, a "veterans' preference eligible" Civil Service employee, was discharged March 8, 1963, from his employment as an Internal Revenue Agent upon a charge of having falsified his job application. It was alleged

that, whereas appellant stated in his job application that he had never been arrested for or charged with a crime, he had been arrested, convicted and sentenced on an Alabama charge of desertion and non-support. Following the procedures established for veterans' preference eligibles, appellant appealed from the Birmingham District Director of the Internal Revenue Service to the Atlanta Regional Office of the Civil Service Commission and then to the Civil Service Commission Board of Appeals and Review. Throughout these administrative proceedings, appellant maintained that he had not understood the Alabama non-support action to be criminal and that, if he had completed his application incorrectly, the mistake was unintentional. On August 15, 1963, the Board of Appeals and Review affirmed appellant's dismissal, finding that all procedural requirements for appellant's discharge had been met. The Board stated that it

> ". . . cannot accept your contention that you did not know you had ever been arrested or convicted in the face of evidence which includes a copy of a warrant for your arrest, a copy of a probation bond for $300, and a copy of a court order showing that you pleaded guilty and were sentenced to twelve months of hard labor for Jefferson County and that the sentence was suspended on three conditions set forth in the court order."

Appellant thereupon brought this declaratory judgment action pro se in the United States District Court for the District of Columbia to contest the validity of his dis-

charge. Appellant's amended complaint alleged, inter alia, that "his arbitrary removal is not supported by the evidence." On cross motions for summary judgment, the District Court entered judgment for the government without opinion. Appellant appealed pro se, and this Court reversed on December 22, 1965. Appellant's present counsel was appointed January 6, 1966.

II.

NEITHER "CLARIFICATION" OF THIS COURT'S OPINION NOR REHEARING IS REQUIRED

That portion of the appellees' pleading which purports to be a motion for "clarification of this Court's December 22, 1965, opinion" is almost frivolous. Appellees state:

> "We are not clear whether the Court intended any additional evidence to be received and evaluated in the first instance by the district court rather than the Civil Service Commission."

The Court's opinion on this point was quite clear:

> "If the Government appellees are of a mind to pursue this matter, it is to be expected that they will correct the inaccuracies in their pleadings and also that they will make an earnest effort to present, or cause to be presented, for the benefit of the trial court, full evidence as to exactly what transpired in the Alabama proceedings." (Emphasis added.)

The Court denied appellees' motion for a protective order. It granted appellant's motions in aid of discovery under the Federal Rules of Civil Procedure, subject, of course, to executive privilege. These rulings confirm and supplement this Court's direction that, if the matter is carried further, it will be in the District Court.

What appellees may mean when they ask for "clarification" is that they think the Court's decision and order here are contrary to other actions and decisions of this and other courts. Those other actions and decisions cited by the government, however, are easily reconcilable.

The government relies most heavily upon Dabney v. Freeman, No. 19,207, D.C. Cir., decided December 28, 1965. The Dabney case differs both factually and procedurally from this case and is not in point. No administrative finding had been made on the issue Miss Dabney first brought to the District Court. Her administrative remedies had not been exhausted; the record was procedurally incomplete. She had resigned -- under coercion, she contended. The Civil Service Commission had refused to hear her appeal because it considered that her resignation was not an appealable "adverse action." The District Court was unable to evaluate the record to establish whether there was a rational basis for the Civil Service Commission action. The court therefore required the

Commission to determine initially whether Miss Dabney's "resignation" was a discharge, and accordingly the matter was remanded to the Commission (with Miss Dabney's consent) for a finding on that threshhold question. After the Civil Service Commission made its finding, both the District Court and this Court were persuaded that the finding was supported by the evidence in the administrative record.

Goodman v. United States, No. 19,654, D.C. Cir., decided March 10, 1966, is almost identical to the Dabney case, except that in Goodman, the Civil Service Commission Board of Appeals and Review did make a ruling to the effect that the employee's resignation was voluntary and that the District Director's decision not to hear the appeal was, therefore, correct. This Court, in a per curiam opinion, reversed the summary judgment entered below for the government and remanded the case to the Civil Service Commission "for a Dabney-type hearing." Thus, in Goodman as in Dabney, a preliminary (in a sense, jurisdictional) issue of fact had to be resolved by the Commission before a court could begin to test the validity of the adverse action: the preliminary issue of whether or not the employee had been discharged in the first place.

The case at bar presents a different and more familiar issue. There is no question here but that appellant was discharged. Moreover, his contention that he did not intentionally falsify his application was considered at each of the three administrative levels at which his case was heard. The Board of Appeals and Review resolved the issue of appellant's intent by relying upon the court records, but this Court held

> "Weinberg's claim that he failed to realize the full import of the paper formalities is to be evaluated in the light of reasonableness in the context of events. He is not foreclosed by the bare records of the Alabama court."

The issue for the District Court on remand is, therefore, whether the adverse action taken by the Commission has rational support in the administrative record. The government cites four cases holding that judicial review of employee discharges is limited in scope to precisely that issue.[1/] Appellant agrees that

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1/ Mendelson v. Macy, No. 19,310, D.C. Cir., decided January 13, 1966; Baum v. Zuckert, 342 F.2d 145 (6th Cir. 1965); Chiriaco v. United States, 339 F.2d 588 (5th Cir. 1964); Seebach v. Cullen, 338 F.2d 663 (9th Cir. 1964), cert. denied, 380 U.S. 972 (1965). The government also refers to Eustace v. Day, 114 U.S. App. D.C. 242, 314 F.2d 247 (1962); Saggau v. Young, 100 U.S. App. D.C. 3, 240 F.2d 865 (1956); Pelicone v. Hodges, infra, this footnote. Not one of these cases involved the remand issues raised here by the government.

An additional issue in judicial review of employee discharge cases not present in the case at bar is whether,

the scope of review is so limited. But the government goes on to argue from these cases that any evidence necessary to a proper test of the administrative record must be heard in the Civil Service Commission. This argument stretches too far the cases cited to support it, and it misconceives the function of the declaratory judgment action.

Counsel for appellant have discovered neither case law nor statutory authority to support the type of remand urged by the government. Unlike the statutory review provided for determinations of the regulatory agencies, which commonly involves a petition for review direct to the United States Court of Appeals,[2/] there is no statutory provision for judicial review in employee discharge cases. See 58 Stat. 390 (1944), as amended, 5 U.S.C. § 863 (1964). Review in such cases, as here, is by a declaratory judgment action naming as defendants

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1/ continued:

with respect to the adverse action complained of, all procedural requirements of law have been satisfied. Pelicone v. Hodges, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963).

2/ E.g., Federal Trade Commission Act, 38 Stat. 720 (1914), 15 U.S.C. § 45(c) (1965). See 3 Davis, Administrative Law Treatise § 23.03 (1958).

the same Civil Service Commissioners who acted as judges in the administrative proceedings. 3 Davis, Administrative Law Treatise § 23.04 (1958).

The declaratory judgment action is not an appeal, nor is it a trial de novo of the same facts heard by the Commission. The action tests an administrative record against plaintiff's allegations of its insufficiency. See 6 Moore, Federal Practice § 57.21[3]. Here, plaintiff has alleged that "his arbitrary removal is not supported by the evidence." This case, then, is not the Dabney or Goodman situation, where the administrative action complained of was incomplete and therefore not ripe for consideration by the District Court. The administrative record here is complete and closed. This Court has decided that a full exposition of the facts concerning the Alabama proceedings in which appellant was involved is necessary in order to test adequately the sufficiency of the closed administrative record. It is for the District Court, not the Civil Service Commission, to hear the evidence and administer the test. This is especially true because the local law questions involved here are particularly appropriate for legal and judicial, as distinguished from administrative, consideration. See generally, Comment, "Dismissal of Federal Employees -- the Emerging Judicial Role," 66

Colum. L. Rev. 719, 722-25 (1966).

III.

IF THIS COURT GRANTS REHEARING IT SHOULD DIRECT THE DISTRICT COURT TO ENTER SUMMARY JUDGMENT FOR APPELLANT

Appellant contends, as this Court has already ruled, that if additional evidence is to be heard, the hearing should be in the District Court. Appellant also submits, however, that this Court need not reach the question of where additional evidence should be heard, because appellant is entitled to summary judgment as a matter of law. First, analysis of the awkward machinery which was employed in Alabama prior to 1961 to compel a father to support his illegitimate child establishes as a matter of law that the proceedings which appellant did not report were not criminal and, therefore, not reportable. Second, even if there were some vestigial quasi-criminal element in the state proceedings, the record exposes the government's complete failure to carry its burden in the administrative proceedings of showing that appellant knew the desertion and non-support action was criminal and that he intentionally falsified his application by deliberately omitting reference to them for the purpose of misleading the government. Pelicone v. Hodges, supra.

1. The Alabama Proceedings Involving Appellant Were Civil, Not Criminal, and Therefore Not Reportable.

A review of the Alabama law in force at the time of the proceedings involving appellant indicates that "full evidence as to exactly what transpired" is not necessary to a ruling that his discharge was wrongful. It is submitted that appellant did not falsify his application because the Alabama proceedings were not criminal and not reportable.

The opinion of this Court pointed out errors in the government's presentation and its confusion about Alabama bastardy and desertion and non-support proceedings. In fact, the mother of appellant's illegitimate child instituted both bastardy and non-support actions against him, it would appear, because now superseded Alabama statutes made it impossible for her to obtain a court order for adequate support payments in any other way.

In most jurisdictions there is and was a non-criminal bastardy proceeding pursuant to which a court is empowered to determine that a particular man is the father of an illegitimate child and, thereupon, to order him to make payments for the support of the child

commensurate with its needs and his ability to pay.[3/] Prior to 1961, Alabama law on this subject was conspicuously defective: the pre-1961 Alabama bastardy statute barred a court from obligating the father of an illegitimate child to pay more than $100 per year![4/] In order to impose a reasonably sufficient court-ordered obligation upon the father of an illegitimate child, Alabama, prior to 1961 changes in the law, imported

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3/ The District of Columbia provision is typical. D.C. Code §§ 11-958(a), 11-960 (1961). As early as 1935, there were 32 such jurisdictions. 4 Vernier, American Family Laws 213-14 (1935). Of the remaining states having outdated legislation identified, and criticized, by Vernier, ibid., all but Alabama had enacted modern statutes by 1957: Del. Code Ann. Tit. 13, § 1326 (1955); Fla. Stat. Ann. § 742.041 (1951); Ann. Code Md. Art. 12, § 9(i) (1957); Code of Laws of S.C. § 20-305 (1952); Tenn. Code Ann. § 36-213 (1956); Utah Code Ann. § 77-60-7 (1953); Ark. Stats. (1947) § 34-706 [judge's discretion]. Ill. Ann. Stat. Chap. 106-3/4, § 52 (1957); Alaska Stats. § 25.20.050; Rev. Laws of Hawaii § 330-12 (1955) [putative father's duty same as lawful father]. Ore. Rev. Stat. § 109.150 (1960) [annual payments from $350 to $500 depending on age of child, amended in 1963 to $900 per year].

4/ Code of Alabama, Tit. 6 (1941) (Recomp. 1958). As originally enacted in 1852, this statute barred a court from requiring a father to pay more than $50 per year to support an illegitimate child. The ceiling was "raised" to $100 in 1923. 1923 Code of Ala. § 3427. The statute was modernized and the ceiling removed in 1961. Act No. 295, 1961 Acts of Alabama 2353 codified at Tit. 27, §§ 12(1)-12(10). See Comment, 17 Ala. L. Rev. 83, 87 (1964).

into conventional non-criminal bastardy proceedings a companion action under the Alabama desertion and non-support statute.[5/] Supplementing a bastardy action with an action under the desertion and non-support statute, the courts invoked some of the forms of this misdemeanor proceeding for the purpose of imposing upon a man an obligation to pay more than $100 per year for the support of his illegitimate child.

That pattern was apparently followed in the proceedings involving appellant. On March 5, 1959, an action was brought against him in a bastardy proceeding. It remained dormant until February 2, 1960, when, after the birth of the child, the appellant acknowledged paternity in open court in the bastardy proceeding. At that point, the court's power was limited to ordering an inadequate $100 per year payment for the support of the child. Thereupon, simultaneously, a desertion and non-support action was commenced and completed -- all in one day. In this latter proceeding, the court used the form of a criminal judgment and sentence to impose on the defendant an obligation to pay $10 per week (or $520 per year) for partial support of his illegitimate child --

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5/ Code of Ala., Tit. 34, §§ 89-90 (1940) (Recomp. 1958).

$420 more per year than a court could have ordered him to pay under the conventional bastardy proceeding.

Even though both the bastardy and the supplementing desertion and non-support proceedings have some facets which are similar to criminal proceedings, the Alabama courts and authorities recognize that they are not, as a matter of law, criminal.

(a) The bastardy statute in force in 1960 was civil in nature.

The nature of a bastardy action[6] was stated at a very early date in State v. Hunter, 67 Ala. 81, 83 (1880):

> "[A] proceeding under our statute, in a bastardy case, is sui generis, and partakes of the nature of both a criminal prosecution and a civil suit, and may therefore be styled quasi criminal."

Again, in Shows v. Solomon, 91 Ala. 390, 392, 8 So. 713, 713 (1890), the Alabama Supreme Court stated with respect to a bastardy action:

> "[T]he procedure assimilates itself to that of a criminal prosecution, but it is neither a case for the grand jury, nor is it, in this proceeding, prosecuted as an offense against the peace and dignity of the state. If, on trial in chief, defendant is convicted, no fine is imposed on him. The sentence is that he pay the costs, and enter into a bond conditioned to pay not exceeding $50 a year, as the court may order for the period of 10 years, 'for the support and education of the child.'"

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6. The bastardy statute provided, in relevant part:

> "On the trial . . . if found against the defendant, judgment must be rendered against him for the costs, and he must also be required to enter into bond . . . in the sum of one

In Miller v. State, 110 Ala. 69, 86-87, 20 So. 392, 397-98 (1896), the Court stated:

> "A proceeding in bastardy, though penal in its character, and quasi criminal, is not a criminal prosecution within the meaning of the statute. The weight of authority holds to the view that the action is a civil proceeding."

These judicial interpretations of the bastardy statute remained unchanged at the time of the proceedings in which appellant was involved.[7/]

(b) The desertion and non-support statute was employed here as an auxiliary to the bastardy statute.

The desertion and non-support statute[8/] has been invoked here as the mechanism to obtain a court

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6/ continued:

> thousand dollars, payable to the state, and conditioned to pay . . . such sum, not exceeding one hundred dollars a year . . . in each year, for ten years . . . for the support and education of the child. . . ." Code of Ala., Tit. 6, § 12 (1940) (Recomp. 1958).

7/ The statute was modernized effective September 15, 1961. See footnote 4, supra.

8/ The desertion and non-support statute provides that:

> "Any husband who shall without just cause, desert or willfully neglect or refuse

order requiring a putative father to provide reasonably for the support and maintenance of his illegitimate child. It added to the inadequate provision available under the bastardy statute. Patterson v. State, 127 So. 792 (Ala. App.), cert. denied, 221 Ala. 98, 127 So. 793 (1930). See Turner v. State, 104 So.2d 775 (Ala. App. 1958). Equity provided no remedy if the $100 per year bastardy payments left the mother and child without sufficient funds. Baugh v. Maddox, 266 Ala. 175, 95 So.2d 268 (1957).[9/] The procedure commenced by the appellant's alleged "arrest" on a

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8/ continued

or fail to provide for the support or maintenance of his wife, or any parent who shall without lawful excuse desert or willfully neglect or refuse or fail to provide for the support and maintenance of his, or her, child, or children, under the age of eighteen years, whether such parent have custody of such child, or children, or not, she, or they then being then and there in destitute or necessitous circumstances, shall be guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine of not exceeding one hundred dollars, or be sentenced to a term in the county jail, or at hard labor for the county for a period of not more than twelve months, or the fine may be in addition to either the sentence to jail or to hard labor." Code of Ala., Tit. 34, § 90 (1940) (Recomp. 1958).

9/ In the Baugh case, the Alabama Supreme Court indicated that the statutory remedies were exclusive because of the common law rule that a bastard is filius nullius. The Court remarked that the problem of support for illegitimate children was a sociological one properly the province of the legislature. Four years later, the Alabama legislature modernized the bastardy legislation. Footnote 4, supra.

charge of desertion and non-support was a corollary of the civil procedure for obtaining a court order for maintenance of appellant's illegitimate child. See Upton v. State, 255 Ala. 594, 52 So.2d 824 (1951).

Fines and forfeitures under the non-support statute, as under the bastardy statute, are payable not to the state but into a fund administered by the courts and payable to the woman or children intended to be supported and maintained by the statutes. Law v. State, 239 Ala. 428, 191 So. 803 (1939); Shows v. Solomon, supra.

A combination bastardy and non-support action such as this is, we contend, no bona fide charge of violating the criminal law of Alabama. The form of proceeding was the only way possible to obtain adequate court-protected support for a child. Nor are the recorded facts of conviction and sentencing meaningful. The plea of guilty, conviction and suspended sentence were vestigal formalities, or as the Court suggested, a "meaningless routine" necessary as a predicate to a judgment and court order directing adequate payments for the child.

The Alabama Supreme Court has explained the nature of the desertion and non-support statute in

Law v. State, 239 Ala. 428, 431-32, 191 So. 803, 806 (1939):

> "The punishment imposed in [crimes generally] has a two-fold purpose, (1) reformation of the convicted offender, and (2) a deterrent to others who might be disposed to commit such a crime. [Citation omitted.]
>
> "But the primary purpose of the acts now under consideration, so far as we are here interested, is to secure the present enforcement of a duty owing by a parent to his child. [Citation omitted.] It is a stringent proceeding in certain situations to cause payment of alimony and maintenance, similar to that required in equity." (Emphasis added.)

Our view that the Alabama non-support statute is not criminal in nature has been corroborated by the Attorney General of the State of Alabama, in an opinion letter dated April 12, 1965, attached hereto as Appendix I:

> "Desertion and non-support is not one of the crimes, the conviction thereof which will disqualify a person from registering and voting as provided by Section 182 of the Constitution, nor is it a crime involving moral turpitude. As a matter of fact, it is only a quasi-criminal offense . . . ."

As the Alabama Supreme Court has observed in a related context:

> "[A] proceeding penal in character and quasi-criminal, even though prosecuted by the State's representative [the solicitor] in the name of the State, and

> imposing, upon contingencies, hard labor for the county and imprisonment was not a criminal prosecution." Ex parte Pepper, 185 Ala. 284, 290-91, 64 So. 112, 115 (1913). (Emphasis in original.)

Or, as this Court observed in Pelicone v. Hodges, 116 U.S. App. D.C. 32, 35, 320 F.2d 754, 757 (1963):

> "Whatever we . . or the Civil Service Commission may think of such conduct, the fact remains that it is not criminal. Of course, neither appellant's admission of the facts nor his forfeiture of collateral can make the act a crime." 10/

The question on appellant's application form as to arrests or charges for violations of law is plainly intended to effect disclosure of criminal records, and any applicant for federal employment should so interpret the question. Accordingly, the Alabama

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10/ Since the modernization of the Alabama bastardy statute effective September 15, 1961, see footnote 4, supra, the desertion and non-support procedure has been reserved as a genuinely criminal "club" for enforcement of civil judgments entered under the new bastardy statute. Ward v State, 170 So.2d 500 (Ala. 1964). Compare D.C. Code §§ 11-961(b), 22-903-06 (1961).

proceedings in which appellant was involved were not reportable, and appellant's discharge for failure to report the proceedings was invalid as a matter of law.

(c) To require disclosure of these proceedings would discriminate against residents of Alabama.

It is suggested that the Veterans Preference Act requirement that no preference eligible shall be discharged "except for such cause as will promote the efficiency of the service," 58 Stat. 340 (1944), as amended, 5 U.S.C. § 863 (1964), should be susceptible of uniform application to any United States citizen regardless of the state in which he happens to live. Statutes differ from state to state, but the efficiency of the Internal Revenue Service should not. The form which appellant filled out was obviously intended to develop facts having a potential effect upon the efficiency of the service. Civil Service Regulations in force at the time in question provided that the agency "may require removal" after an employee's one-year probationary period only for "intentional false

statements or deception or fraud in examination or appointment." 5 C.F.R. § 2.107(c) (1961). The discretionary language would seem to allow removal, not necessarily because of the falsification, but because the information disclosed in some way affects the efficiency of the service and would have affected the decision to employ had it been disclosed at the pre-employment stage. So far as appellant has been able to determine, Alabama was the only state in 1960 where charges of willful desertion and non-support were a practical prerequisite to a court order requiring adequate payments for the support of an illegitimate child. Surely, the "efficiency of the service" is not affected by the hiring of an employee who is the father of an illegitimate child and has been compelled by court order to support that child. See Shelton v. Tucker, 364 U.S. 479, 487-90 (1960); Scott v. Macy, ___ U.S. App. D.C. ___, 349 F.2d 182 (1965); Comment, "Dismissal of Federal Employees -- The Emerging Judicial Role," 66 Colum. L. Rev. 719, 737-40 (1966). The Standard Form 57 which appellant executed evidences no interest in such matters. An applicant is asked only whether he is married or single -- not whether divorced, not how many dependents, not even whether unsatisfied

civil judgments are outstanding. If federal employees resident in Alabama were required to divulge information as to paternity suits while residents of every other state were free to remain silent, then Alabamans would have received discriminatory treatment.

2. The Government Failed In the Administrative Proceedings to Carry Its Burden of Showing Intent to Falsify.

Even if the Alabama proceedings involving appellant were reportable, the government has failed to carry its burden of proving that the appellant intentionally falsified his application. This Court has examined the record that was before the District Court and the Commission. This Court concluded that

> "The burden from the beginning was upon the Government in the discharge proceeding, and that burden must necessarily be to establish intentional falsification."

Appellant submits that this Court, in reversing the judgment of the District Court, must have concluded that the government failed to carry this burden. Here, as in Pelicone v. Hodges, supra, 320 F.2d at 755-56:

> "Appellant has consistently maintained that he had no reason to believe he had been arrested. . . . There is no testimony that he was told he had been arrested, or that the circumstances were such as to indicate to a

> layman that he was being 'arrested'. . . . Hence there is nothing in the record to support a determination that appellant made an 'intentional false statement or deception or fraud' warranting discharge."

In Pelicone, having determined that other charges against appellant were not supported by the evidence in the administrative record, this Court reversed a summary judgment entered below for the government and instructed the District Court to enter summary judgment for the employee. Appellant submits that Pelicone is controlling here, and that the same disposition should now be made of this case.

A distinction between the records of the two cases may be claimed in that here there is evidence that appellant signed several pieces of paper (as instructed by his lawyer) which, had he read them, might have brought home to him the fact that he was "technically" under arrest. Note, however, that Pelicone apparently was actually taken into custody. Moreover, as this Court pointed out in its opinion, appellant could not have been charged with desertion and non-support under Alabama law unless he had first either acknowledged paternity or been adjudged the father. The Court found it "difficult to believe" that appellant acknowledged paternity in open court and then pleaded guilty on the same day to charges of

willful desertion if he knew, or thought, he was being charged with a crime. The Court has also stated that the 'burden from the beginning was upon the Government . . . to establish intentional falsification.' Appellant submits, therefore, that the Civil Service Commission did not carry their burden in the administrative record.

To remand this cause to the District Court to permit the government now to prove there what it failed to prove administratively is in effect to grant the government, and subject the defendant to the harassment of, a new trial. If the case were being remanded because a court or administrative agency had erroneously prevented a plaintiff from carrying its burden of proof, a new trial might be in order. But here the Commission was both plaintiff and court. It had a full opportunity to prove to itself on the record at three levels that the appellant made an intentional false statement. That proceeding has ended. This Court's opinion indicates that appellees discharged appellant without carrying this necessary burden of proof. He was erroneously discharged. The government has not and cannot establish in the District Court that it carried the necessary burden of proof in the administrative proceedings here at issue that the appellant <u>intentionally</u> made a false statement. Thus there is no material issue

of fact to be tried in the District Court. Appellant is entitled to summary judgment as a matter of law. This Court should so instruct the District Court. Pelicone v. Hodges, supra. See Kutcher v. Higley, 98 U.S. App. D.C. 278, 235 F.2d 505 (1956).

IV.

CONCLUSION

For the reasons stated, this Court should neither "clarify" its December 22, 1965, opinion nor hear new argument thereon. If this Court should reconsider its opinion, however, it should now dispose of this case by directing the District Court to enter summary judgment for appellant.

Respectfully submitted,

/s/ Louis F. Oberdorfer

Louis F. Oberdorfer

/s/ James Robertson

James Robertson
Attorneys for Appellant
Appointed by this Court

Of Counsel:

WILMER, CUTLER & PICKERING

APPENDIX I

-570-

April 12, 1965

Hon. W. M. Cain
Chairman
Board of Registrars
Jefferson County Courthouse
Birmingham, Alabama

Dear Mr. Cain:

I have your letter of recent date in which you as Chairman of the Jefferson County Board of Registrars ask the following questions:

"1. Is a prospective voter barred from registering and/or should a qualified voter be purged from the voting list because of a conviction of a city ordinance wherein the subject is charged with Petit Larceny?

"2. Is a prospective voter barred from registering and/or should a qualified voter be purged from the voting list because of a conviction of Title 14, Section 366, commonly referred to as desertion and non-support?"

My answer to your first question is in the affirmative.

Section 182 of the Constitution of 1901 provides that persons convicted of larceny are disqualified both from registering and voting.

In my opinion, it is immaterial that the persons have considered were convicted of violation of a city ordinance or petit larceny. They have nonetheless been convicted of larceny as the only difference between petit larceny and grand larceny is the value of the property stolen. It is also immaterial that they have been convicted in a city for the violation of a city ordinance. They have nonetheless been convicted of larceny.

My answer to your second question is in the negative.

Desertion and non-support is not one of the crimes, the conviction thereof, which will disqualify a person from registering and voting as provided by Section 182 of the Constitution, nor is it a crime involving moral turpitude. As a matter of fact, it is only a quasi criminal offense and the conviction thereof will not in my opinion disqualify a person from registering and voting.

In your request, you state that the persons here considered have been convicted of violating Title 13, Section 366, Code of Alabama 1940. This section has to do with contributing to the delinquency of a minor child and is not connected with desertion and non-support. I assume that you refer to a conviction of desertion and non-support rather than a conviction under Section 366, supra.

Yours very truly,

RICHARD M. FLOWERS
Attorney General
By -

WILLIAM N. McQUEEN
Assistant Attorney General

WMM:ch

CERTIFICATE OF SERVICE

I certify that a copy of the attached Opposition to Appellees' Motion for Clarification and Answer to Appellees' Petition for Rehearing or Rehearing en banc was delivered, by hand, to the office of Frank Q. Nebeker, Esq., Chief, Appellate Division, Office of the United States Attorney for the District of Columbia, Washington, D.C., this 23rd day of May, 1966.

/s/ James Robertson

James Robertson